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SUPREME COURT, U.S.

(3)

No. 99-1225

IN THE

Supreme Court of the United States

PARSONS CORPORATION; PARSONS ENGINEERING SCIENCE, INC.; PARSONS ENVIRONMENTAL SERVICES, INC.; AND THE RALPH M. PARSONS COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* JANET C. OLIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I.

Respondent Janet C. Oliver argues that certiorari should be denied because this Court has already addressed all relevant constitutional issues in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). Respondent asserts that Congress *intended* the 1986 Amendments to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to create "a new cause of action" for relators. Opp. at 2. Respondent also asserts that the Executive has *intended* to permit or to consent to Respondent's prosecution of this action. Opp. at 4. Neither point, however, even if true, addresses the constitutional issue whether Congress may validly eliminate the Article III "particularized injury" requirement.

Petitioner Parsons acknowledges that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 6 (1968)). It is axiomatic, however, that Congress may not create federal jurisdiction in a manner inconsistent with the strictures of Article III. *See e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And it is now well-settled that, at an "irreducible minimum," Article III requires a plaintiff to have suffered an "injury in fact" that is "particularized" to her in the sense that it "affect[s her] in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992). Here, Respondent's only asserted injury is to the United States. She alleges no claim of injury to herself. Article III requires more.

II.

The Ninth Circuit, as most of the circuits, has previously determined that *qui tam* plaintiffs have standing. *See United States ex rel. Kelly v. Boeing*, 9 F.3d 743 (9th Cir. 1993); *see also United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977). It is settled law. Petitioner Parsons could not and did not raise the constitutional jurisdictional questions below. Issues concerning the constitutional jurisdiction of the federal courts, however, may be raised at any stage of the proceedings. *Clinton v. City of New York*, 524 U.S. 417, 428 (1998). Indeed, this Court's precedent requires federal courts to consider such jurisdictional issues even when not raised by the parties. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon [the merits] when it has no jurisdiction to do so is . . . for a court to act ultra vires.").

III.

This case comprises the optimum presentation of the constitutional issues underlying the *qui tam* provision of the False Claims Act — the constitutionality of which is even strongly in doubt at the Department of Justice. *See Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207, 208 (1989) (opinion of former Attorney General William P. Barr) ("The Office of Legal Counsel, the Civil Division, and the former Office of Legal Policy all agree that the *qui tam* provisions

in the False Claims Act are unconstitutional [under Article III, the Appointments Clause, and the separation of powers doctrine].").[1] This petition squarely raises both the Article III standing presented herein and the Article II questions reserved in *Friends of the Earth, Inc. v. Laidlaw, Environmental Services (TOC), Inc.*, __ U.S. __, 120 S. Ct. 693, 713, 719-20 (2000) (concurring opinion of Kennedy, J. and dissenting opinion of Scalia, J.). It presents no issue of statutory interpretation or sovereign immunity, *compare United States ex rel. Stevens v. Vermont*, 162 F.3d 195 (2d Cir. 1998), and no complex government contract regulatory issue. The facts are not in dispute for purposes of this appeal. Finally, the relator does not allege a retaliation cause of action under 31 U.S.C. § 3730(h) or any other "injury in fact" that is particularized to her. *Compare Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514, 541 (5th Cir. 1999) (DeMoss, J., concurring). This petition serves up a perfect candidate for consideration of the constitutional issues implicated by the *qui tam* provisions of the False Claims Act.

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1. Speaking on behalf of the Civil Division of the Office of the Attorney General, then-Assistant Attorney General Barr went on to state:

> We believe [the *qui tam* provisions of the False Claims Act] violate the Appointments Clause, infringe on the President's core Article II authority to execute the law, and violate Article III standing doctrine. The Civil Division would like to enter an appropriate case and, either as amicus or by intervention, present the executive branch's arguments against the constitutionality of *qui tam*. The Solicitor General argues that we should intervene in district court to support the constitutionality of *qui tam*.

13 Op. Off. Legal Counsel at 208.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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